ALLEN D. MILLER

IBLA 91-381 Decided January 15, 1993

Appeal from a decision of the Kremmling Resource Area Manager granting a right-of-way for the proposed Muddy Creek Reservoir. COC-45805.

Motion to dismiss denied.

1. Rules of Practice: Appeals: Generally--Rules of Practice: Appeals: Standing to Appeal

   A person who has participated in the decisionmaking process in the capacity of president of a corporation is party to a case in his personal capacity.

2. Rules of Practice: Appeals: Generally--Rules of Practice: Appeals: Standing to Appeal

   An adverse effect on a competitor's economic interests is a legally cognizable interest sufficient to grant the competitor a right of appeal.

APPEARANCES: Allen D. Miller, Palmer Lake, Colorado, pro se; John R. Kunz, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management; Donald H. Hamburg, Esq., Glenwood Springs, Colorado, for the Colorado River Water Conservation District.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Allen D. Miller has appealed the June 17, 1991, decision of the Area Manager, Kremmling Resource Area, Bureau of Land Management (BLM), granting a right-of-way to the Colorado River Water Conservation District (CRWCD) for the proposed Muddy Creek Reservoir in Grand County, Colorado.

Several pending motions require attention:

1) On August 10, 1992, appellant filed a request for a stay of construction of the Muddy Creek Reservoir;

2) On September 1, 1992, the CRWCD filed a motion that we issue an order that appellant show cause why his appeal should not be dismissed for failure to serve his August 10, 1992, request for a stay on CRWCD; CRWCD bases this motion, and its accompanying request that we impose monetary sanctions on appellant in the

amount of CRWCD's attorney fees and expenses in opposing the request for a stay, on 43 CFR 4.27(b)(2), which authorizes the imposition of sanctions on a person who knowingly makes a prohibited ex parte communication;

3) On September 4, 1992, appellant requested we order CRWCD to provide copies of all current and pending Muddy Creek agreements to the parties; this request was elaborated in a letter filed September 21, 1992; and

4) On September 23, 1992, BLM filed a motion to dismiss the appeal because appellant is not a party to the case and is not adversely affected by BLM's decision and therefore does not have a right of appeal to the Board.

Our order of September 29, 1992, took appellant's request for docu-ments under advisement and authorized him to reply to the CRWCD and BLM motions. Appellant filed an interim answer later on September 29, 1992, and a response to our September 29 order on November 3, 1992. CRWCD filed a response to appellant's request for documents on September 29, 1992, and a response to appellant's interim answer on October 5, 1992. Appellant filed a response to CRWCD's October 5th filing and a request that we order CRWCD and BLM to response to four enumerated charges on October 9, 1992. CRWCD filed a Response to appellant's November 3, 1992, Response on November 12, 1992; BLM joined this CRWCD Response on November 19, 1992. Appellant filed a Response to these responses on November 23, 1992.

BLM argues that appellant is not a party to the case because he did not individually participate in BLM's decision-making process before it granted the right-of-way for the reservoir, although he did submit comments on behalf of the corporation of which he is president. Corrected Response to Request for Stay at 4-5. BLM observes that one of the letters appellant filed on behalf of his company did not speak to the proposed Muddy Creek Reservoir at all. Appellant says he became a party to the case "by my written protests during the public review period for the Draft, Supplemental Draft, and Final EIS" (Response to Sept. 29, 1992, IBLA Order at 1).

[1] "A party to a case is the responsible party who had taken the action which is the subject of the BLM decision on appeal, is the object of that decision, or who had otherwise participated in the decisionmaking process leading to that decision." Stanley Energy, Inc., 122 IBLA 118, 120 (1992). "[I]n order to become a party to a case, one must actively participate in the decisionmaking process which leads to the appeal." Edwin H. Marston, 103 IBLA 40, 42 (1988). We cannot find in our decisions on who is a party to a case under 43 CFR 4.410(a) that we have distinguished between participation as a natural person and on behalf of a corporation, and we do not believe the distinction would further the purpose of the requirement that a person must be a party to the case in order to have a right of appeal. That purpose is "to afford a framework by which decisionmaking at the departmental and State Office level may be intelligently made" and to

provide BLM "the benefit of [the] individual's input when the original decision was made." California Association of Four Wheel Drive Clubs, et al., 30 IBLA 383, 385 (1977). Since the substance of appellant's comments to BLM as president of the corporation and on appeal to us is similar, we think it would be capricious to hold he does not have a right of appeal because he is not a party to the case.

[2] BLM argues that even if appellant is a party to the case he does not have a legally cognizable interest that is adversely affected. His investment in an alternative water supply project that will be disadvantaged by the Muddy Creek Reservoir is not such a legally cognizable interest, BLM argues. Rather, BLM suggests that appellant's status is merely that of a "disgruntled competitor" and that we have not accorded a right of appeal to such a person. We do not agree. For example, in John D. Archer, 120 IBLA 290 (1991), we entertained the appeal of a person who complained that BLM's grant of a right-of-way for a phosphate slurry pipeline should have required the grantee to operate the pipeline as a common carrier so that owners of nearby phosphate mines could use it to ship their ore upon payment of the appropriate costs. We believe an adverse effect on a competitor's economic interests is a legally cognizable interest sufficient to grant the competitor a right of appeal.

CRWCD argues we should impose sanctions on appellant for knowingly filing ex parte communications because his August 4, 1992, request for a stay of construction was not served on CRWCD even though we specifically pointed out the requirements of 43 CFR 4.22(b) to appellant in the order dated October 25, 1991. "Miller's failure to serve the documents he files with the Board on the other parties in the case cannot be attributed to inadvertence or ignorance, but is a willful failure to respect the Board's Order" (Response of the [CRWCD] to the Request for Stay Pending Appeal by Allen D. Miller at 5). Appellant replies that he did not send his August 4, 1992, letter to CRWCD "because I have been advised by a source that the staff manager refuses to pass on my correspondence for board members consideration, as requested."

Appellant's compliance with the procedural rules governing service has been erratic. In accordance with 43 CFR 4.413(d) he provided proof of service of his notice of appeal on CRWCD but not on the Office of the Solicitor. A "memo" dated August 13, 1991, and its enclosures were filed ex parte with the Board and therefore sent to the parties with our order dated August 21, 1991. As CRWCD notes, he did not serve his October 21, 1991, letter on one of the parties and our October 25, 1991, order pointed out the requirement of 43 CFR 4.22(b) that a "copy of each document filed in a proceeding before the Office of Hearings and Appeals must be served by the filing party on the other party or parties in the case." Nor did he serve his August 4, 1992, letter and enclosures on the other parties, so we again sent it to them by order dated August 17, 1992. On the other hand, some of appellant's filings have been properly served on counsel for the other parties, although proof of service has not been provided.

We regard appellant's behavior as careless, not systematic and intentional. In addition, we note that appellant is not a lawyer and is not represented by counsel. We do not believe that sanctions under 43 CFR 4.27(b) are appropriate at this juncture. However, appellant is reminded of the provisions cited above. In addition, 43 CFR 4.413(a) provides that an "appellant shall serve a copy of * * * any statement of reasons, written arguments, or briefs on each adverse party * * * and on the Office of the Solicitor * * * in the manner prescribed in [43 CFR] § 4.401(c) * * * not later than 15 days after filing the document." Appellant is warned that "failure to serve within the time required will subject the appeal to summary dismissal as provided in [43 CFR] § 4.402." 43 CFR 4.413(b). Finally, we observe that appellant's reason for failing to serve his August 4, 1992, on CRWCD is no excuse. Appellant is to serve a copy of any filing with the Board on counsel for CRWCD and BLM. We will not be so tolerant of another failure to do so.

Appellant has not described each item or category of documents he requests with reasonable particularity or explained why the documents
are relevant to his grounds for appeal. See FRCP 16(b), 34(b).

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's motion to dismiss is denied; CRWCD's motion that we order appellant to show cause why his appeal should not be dismissed and impose monetary sanctions on appellant is denied; and appellant's request that we order CRWCD to provide documents is denied.

Appellant's request for a stay of construction is taken under advisement and will be considered in accordance with the criteria set forth in Jan Wroncy, 124 IBLA 150 (1992).

The parties are requested not to file further pleadings unless requested by the Board.

Will A. Irwin
Administrative Judge

I concur:

James L. Byrnes
Chief Administrative Judge